Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1257

In The

Supreme Court of the United States

October Term, 1985

TERRY ROGERS and BRENDA ROGERS,
Appellants,

vs.

CHEYENNE AIRPORT BOARD
and CITY OF CHEYENNE,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

REPLY IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

BERNARD Q. PHELAN
Attorney at Law
2020 Carey Avenue, Suite 402
P. O. Box 1841
Cheyenne, WY 82003-1841
Counsel for Appellants
(307)634-8085

DATE: April, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATUTES INVOLVED	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THIS CASE IS "RIPE" FOR REVIEW	2
II. A "MULTIFACTOR STANDARDS" ANALYSIS IS INAPPROPRIATE WHEN REGULATION RESULTS IN ACTUAL USE OF PROPERTY BY THE PUBLIC.	4
III. THERE IS DIRECT CONFLICT AMONG STATE COURTS CONCERNING THE CONSTITUTIONALITY OF AIRPORT HEIGHT LIMITATION ORDINANCES.	7
SUMMARY	9
CONCLUSION	9
APPENDIX A—Motion to Supplement the Record (Supreme Court of Wyoming)	App. 1

TABLE OF AUTHORITIES

CITATIONS:

	Page
Ackerman v. Port of Seattle, 55 Wash.2d 400, 348 P.2d 664 (1960)	7
Cheyenne Airport Board v. Rogers, 707 P.2d 717 (Wyo. 1985)	7, 8
Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84, 84 S.Ct. 531, 7 L.Ed.2d 585 (1962)	7, 8
Harrel's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 S.2d 439 (Fla. 1959)	7
Indiana Toll Road Commission v. Jankovich, 193 N.E.2d 237 (Ind. 1963)	7
Jackson Airport Authority v. Wright, 232 S.2d 709 (Miss. 1970)	7
Kaiser-Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)	6, 8
LaSalle National Bank v. County of Cook, 34 Ill. App.3d 264, 340 N.E.2d 79 (1975)	8
Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)	6, 8
Parrett v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)	3, 4
Penn Central Transportation Co. v. New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)	4, 6
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922)	5
Roark v. City of Caldwell, 394 P.2d 641 (Id. 1964)	7
United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946)	7, 8

TABLE OF AUTHORITIES—Continued

	Page
Village of Willoughby Hills v. Corrigan, 29 Ohio St.2d 39, 278 N.E.2d 658 (1962)	7
Waring v. Peterson, 137 P.2d 268 (Fla. App. 1962)	7
Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975)	3
Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. —, 105 S.Ct. 1381, 87 L.Ed.2d 126 (1985)	2, 4
STATUTES:	
42 U.S.C. 1983	3
WYO. STAT. 1-26-516 (Supp. 1985)	1, 4
WYO. STAT. 10-4-302	6
WYO. STAT. 10-4-303	6
TREATISES:	
Davis, *Administrative Law Treatise*, Second Edition	3

REPLY TO APPELLEES' MOTION TO DISMISS

Pursuant to Rule 16.5, appellants hereby reply to appellees' motion to dismiss and request that said motion be denied.

———o———

STATUTES INVOLVED

Additional relevant statutory provisions, not previously set forth by the parties, are herein set forth.

WYO. STAT. 1-26-516 (Supp. 1985) provides as follows:

When a person possessing the power of condemnation takes possession of or damages land in which he has no interest, or substantially diminishes the use or value of land, due to activities on adjoining land without the authorization of the owner of the land or before filing an action of condemnation, the owner of the land may file an action in district court seeking damages for the taking or damage and shall be granted litigation expenses if damages are awarded to the owner. (Laws 1981, ch. 174, § 1.)

———o———

SUMMARY OF ARGUMENT

1. This case is "ripe" for review since it has been acknowledged by the parties and proven by uncontroverted evidence that it would have been *futile* for the appellants to seek a variance.

2. The application of the "multifactor standards" of *Penn Central* is inappropriate when regulation results in actual *use* of private property for a public purpose.

3. There is direct and significant conflict among the state courts concerning the constitutionality of airport height limitation ordinances.

ARGUMENT I.

THIS CASE IS "RIPE" FOR REVIEW

Appellees, apparently taking notice of the assertion of the lower court that appellants never applied for a variance, raise the issue of "ripeness" for the first time in this court. (See Appellees' Motion to Dismiss, p. 7). Even though appellees state that, " . . . further proceedings in this case will not produce a different result," (Appellees' Motion, p. 7), they cite *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. —, 105 S.Ct. 1381, 87 L.Ed.2d 126 (1985) for the proposition that there may be a "procedural" defect, (rather than a "jurisdictional" defect), upon which this court should deny jurisdiction.

If this case is not ripe for review in this court, it was not ripe in the first instance and this court should reverse on grounds that the lower court exceeded its jurisdiction in reaching the merits of the constitutionality of the ordinance under the United States Constitution.

However, "ripeness" has never been an issue in this case since seeking a variance prior to suit was considered

to be *futile* by the parties as evidenced by an informal agreement between counsel. (See Affidavit of Bernard Pitts attached to appellants' Motion to Supplemental Record, *infra*, Appendix A, p. 3a.)

The *futility* of seeking a variance was clearly demonstrated at trial by uncontroverted evidence that the Federal Aviation Administration had directed the appellees to enforce the ordinance to the letter to maintain an obstruction free noninstrument approach zone, or to face displacement of the affected runway.

Thus, by virtue of the obvious *futility* of any effort by appellants to seek a variance, the case was and remains "justiciable" and "ripe" for review. Davis, *Administrative Law Treatise*, 2nd Edition, Section 26:1, pp. 414-415. This is especially true when the sole issue before the court is the constitutionality of the ordinance. *Weinberger v. Salfi*, 422 U.S. 749, 45 L.Ed.2d 522, 95 S.Ct. 2457 (1975). The principle of "Finality" set forth in *Williamson County, supra*, has been met in this case.

The allusion by appellees to the possible remedy of "inverse condemnation" being available to appellants, as it was to the landowners in *Williamson County, supra*, is misplaced in this case since this is not an action under 42 U.S.C. 1983. *Williamson County, supra*, applied the rule set forth in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), when it held that the case was not properly brought under 42 U.S.C. 1983 until the landowner had sought compensation under the state law

of "inverse condemnation." *Williamson, supra*, p. 143. Since this is an action for declaratory and injunctive relief under state law, the *Parratt, supra*, "adequate state remedy" rule is inapplicable.

Furthermore, inverse condemnation was not available to appellants since their property rights were only threatened. There must be actual occupancy or damage (not merely threatened occupancy or damage) before inverse condemnation is available under Wyoming law. WYO. STAT. 1-26-516 (Supp. 1985).

ARGUMENT II.

A "MULTIFACTOR STANDARDS" ANALYSIS IS INAPPROPRIATE WHEN REGULATION RESULTS IN ACTUAL USE OF PROPERTY BY THE PUBLIC.

Appellees, as well as the lower court, argue that the multi-factor analysis is applicable to a case where a "zoning" regulation restricts the owner's use of his airspace, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The essential and important distinction between the *Penn Central, supra*, case and the instant case is that the Cheyenne ordinance was enacted to provide an unobstructed approach zone for the *use* of the public for air transportation; while the New York ordinance was to maintain certain historical landmarks for (presumably) aesthetic and historical purposes.

This case *is not* an excess regulation case where an ordinance "goes too far" which results in a "taking" as

in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). This case is one where the government wishes to use appellants' lawfully vested property rights for a public purpose.

Mr. Wood, the airport manager, testified as follows as to the purpose of the zoning ordinance:

> Q. (By Mr. Phelan) What is the approach zone?
>
> A. It's an area which in space, in air which the F.A.A. designates as a minimum area for aircraft approaching the runway.
>
> * * * *
>
> Q. And the purpose of the approach zone is to allow airplanes to approach the . . .
>
> A. A clear area for aircraft approach runway depending on the type of runway useage [sic], different classifications of runways require different approaches.
>
> * * * *
>
> Q. Would I be incorrect in saying, and I'm not an expert in this, that a noninstrument approach zone would be an approach zone which would be as clear as possible of obstructions?
>
> A. I suppose, yeah. I think the intent of having the approach zone is to keep it clear, period.
>
> Q. Okay. And it's for purposes of providing a means by which airplanes can safely land?
>
> A. That's correct, and take off, but primarily landing.
>
> (J. Wood Deposition, Exhibit 24, p. 9.)

It is clear from uncontroverted evidence that the ordinance was enacted to restrict appellants' use of their vested property rights *so that the public could use their property* for purposes of landing and take off of aircraft from the nearby airport.

Thus, by enforcing the ordinance the appellees demanded that appellants a) cut down a large tree located on their property without compensation; and b) keep their airspace "clear", that is, not use it for anything. Such total restriction of use and transfer of use to the public is a "taking" in the classic sense.

Whether or not the appellants had an investment backed expectation in the use of their airspace or whether the removal of the tree had a "particular" impact on the residential use of their property as a whole, are questions which are irrelevant when the public is granted *use* of appellants' rights in their vested property rights. (See WYO. STAT. 10-4-302 and 10-4-303(a) providing "vested" ownership of airspace in surface owners.)

Therefore, the "character of the government action" factor set forth in *Penn Central, supra*, is "determinative", *Loretto v. Teleprompter Manhattan C.A.T.V. Corp.*, 458 U.S. 419 (1982), since the public is granted use and access to appellants' property by virtue of the ordinance. *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979).

———o———

ARGUMENT III.

THERE IS DIRECT CONFLICT AMONG STATE COURTS CONCERNING THE CONSTITUTIONALITY OF AIRPORT HEIGHT LIMITATION ORDINANCES.

Since *United States v. Causby*, 328 U.S. 256 (1946) and, later, *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962), many state courts have dealt with the issue of "taking" of airspace both in the context of frequent overflight without "zoning" being an issue (See e.g., *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 348 P.2d 664 (1960)); and in the context of zoning ordinances restricting use of airspace. (See e.g., *Indiana Toll Road Commission v. Jankovich*, 193 N.E.2d 237 (Ind. 1963); *Roark v. City of Caldwell*, 394 P.2d 641 (Id. 1964); *Jackson Municipal Airport Authority v. Evans*, 191 S.2d 126 (Miss. 1966)).

In all of the cases dealing with zoning ordinances, the courts have held that *Causby* and *Griggs*, *supra*, require that when actual damage is shown, the ordinances be declared unconstitutional "takings." Only the Wyoming Court, in *Cheyenne Airport Board v. Rogers*, 707 P.2d 717 (Wyo. 1985), has held that, *even when actual damage is shown*, the ordinance is not a taking requiring just compensation.

The courts which have held that no taking has occurred uniformly also find that no damage has been shown, (See e.g., *Harrel's Candy Kitchen v. Sarasota-Manatee Airport Authority*, 111 S.2d 439 (Fla. 1959); *Waring v. Peterson*, 137 S.2d 268 (Fla. App. 1962); *Village of Willoughby Hills v. Corrigan*, 29 Ohio St.2d 39, 278 N.E.2d 658

(1962), *LaSalle National Bank v. County of Cook*, 34 Ill. App.3d 264, 340 N.E.2d 79 (1975)).

Despite the bald assertion of the lower court that appellants never ". . . demonstrated any evidence of substantial interference with the use and enjoyment of the surface," *Cheyenne Airport Board, supra,* at p. 729, the evidence was uncontroverted that to enforce the ordinance would cause a loss to the appellants of $2,064.00. Such a loss is substantial—but the dollar amount of the loss *should not* in any way be determinative since the "taking" is occasioned by actual *use* of the appellants' property by the public for public transportation. Such use should be *determinative. Loretto, supra.*

In the same vein, proof that the public will or has actually used or occupied the property only intermittently should not foreclose a finding that a "taking" is involved. The fact that the public is granted *access* should be determinative. *Kaiser-Aetna, supra.* A public road that is not used is nonetheless a public road.

Such great conflict between the Wyoming Supreme Court and the opinions of this court, as well as the Wyoming Court's extreme departure from well reasoned opinions of other state courts creates a conflict which, if this court affirms the lower court, will create chaos in the law of airspace "takings" as set forth in *Causby* and *Griggs, supra.*

———o———

SUMMARY

This case is ripe for review and presents a substantial federal question regarding the constitutionality under the Fifth and Fourteenth Amendments of so-called airport zoning laws since the lower court has significantly departed from established precedent of this court and is in conflict with numerous other state court decisions.

———o———

CONCLUSION

Appellees' Motion to Dismiss should be denied and probable jurisdiction should be noted. In the alternative, the lower court should be summarily reversed.

Respectfully submitted,

BERNARD Q. PHELAN
Attorney for Appellants
2020 Carey Avenue, Suite 402
P. O. Box 1841
Cheyenne, WY 82003-1841

Counsel for Appellants

(307)634-8085

APPENDIX A

IN THE SUPREME COURT
OF THE
STATE OF WYOMING

No. 84-301

CHEYENNE AIRPORT BOARD and
CITY OF CHEYENNE,

Appellants
(Defendants),

v.

TERRY ROGERS and BRENDA ROGERS,

Appellees
(Plaintiffs).

MOTION TO SUPPLEMENT
THE RECORD REGARDING
"RIPENESS" ISSUE

(Filed Oct. 23, 1985)

COMES NOW the appellees, above named, and move the court for an order granting leave to supplement the record. The grounds for this motion are as follows:

1. Attached hereto is the affidavit of Bernard Pitts wherein he relates his recollection of a conversation between appellees' counsel and himself, prior to commencement of suit regarding appellees' counsel's inquiry regarding exhaustion of remedies.

2. That based upon said conversation, the issue of "variance" or "ripeness" was not raised by pleading, evidence or argument by the City or its co-defendant.

3. That this court has, in its opinion deciding this matter, found that no variance was sought and that, by

implication, the case was not ripe for review; although it purported to review the zoning ordinance on constitutional grounds.

4. That given the silent record concerning the failure to seek a variance, and given a statement by a former City Attorney explaining such silence, the record should be made complete and the appellant-city should be bound by informal good-faith representations by its agents which were, in fact, carried out.

BRENDA ROGERS and
TERRY ROGERS
Appellees - Petitioners

/s/ BY: Bernard Q. Phelan
Attorney for Appellees - Plaintiffs
P. O. Box 1841
Cheyenne, Wyoming 82003-1841

CERTIFICATE OF SERVICE

I, Bernard Q. Phelan, hereby certify that on the 23rd day of October, 1985, I served a true and accurate copy of the foregoing Motion to Supplement the Record Regarding "Ripeness" Issue by depositing same in the United States mail, postage prepaid, addressed to:

Mr. Walt Connell
Assistant City Attorney
Municipal Building—308
2101 O'Neil Avenue
Cheyenne, Wyoming
82001

Mr. John C. Patton
Attorney at Law
P. O. Box 945
Cheyenne, Wyoming
82003-0945

/s/ Bernard Q. Phelan

ROBERT L. NELSON
BERNARD R. PITTS
Attorneys at Law
1716 Capitol Avenue
Cheyenne, Wyoming 82001

(307) 632-2870

October 18, 1985

To Whom It May Concern:

In the early part of 1984, Mr. Bernard Q. Phelan, Attorney-At-Law, phoned me at the City Attorney's office. He was preparing further legal action in the Rogers case and asked me if the City intended to raise the issue of exhaustion of administrative remedies. I informed Mr. Phelan that I was not the attorney handling the case for our office; that Mr. R. Walter Connel, Jr. was doing that. I also informed Mr. Phelan that the City, to the best of my knowledge, was not going to raise the issue he mentioned. I later remember confirming this belief with Mr. Connell. I understand that the City did not raise this issue in brief or in argument before the Wyoming Supreme Court. This conversation with Mr. Phelan took place, to the best of my recollection, after the City Council had failed to override the Mayor's veto of the relief voted to Mr. Rogers, but before Mr. Phelan filed his Complaint with the District Court.

/s/ Bernard R. Pitts

STATE OF WYOMING)
) ss
COUNTY OF LARAMIE)

The foregoing instrument was acknowledged before me as to BERNARD R. PITTS this 10th day of October, 1985.

Witness my hand and official seal.

/s/ Jo-Ann Palluck
Notary Public